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No. 84-6646

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WILLIE LLOYD TURNER,

Petitioner,

v.

ALLYN R. SIELAFF
Director, Virginia Department of Corrections,

Respondent.

On Writ Of Certiorari To The United States Court of Appeals For The Fourth Circuit

---

BRIEF FOR PETITIONER

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QUESTION PRESENTED FOR REVIEW

Where a capital murder case is being tried in a rural county in a state where the death penalty has historically been imposed in a racially discriminatory manner, and where the death sentence is being sought for a black man who is accused of killing a white man, must the trial court grant the defendant's request that the prospective jury members be questioned about their racial prejudices?

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ASSIGNMENT OF ERROR

The trial court's refusal to *voir dire* the jury concerning their racial prejudices denied Petitioner his right to a fair and impartial jury, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3), in that Petitioner alleges violations of rights guaranteed him by the Sixth and Fourteenth Amendments to the United States Constitution.

STATUTORY PROVISIONS INVOLVED

The Virginia statute that states the substantive standards for imposition of the death sentence is *Va. Code Ann.* § 19.2-264.2 (Cum. Supp. 1977):

> In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed.

According to *Va. Code Ann.* § 19.2-264.4(B), mitigating evidence may include, but shall not be limited to, the following:

> (i) The defendant has no significant history of prior criminal activity, or

(ii) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance, or

(iii) the victim was a participant in the defendant's conduct or consented to the act, or

(iv) at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired; or

(v) the age of the defendant at the time of the commission of the capital offense.

CONSTITUTIONAL PROVISIONS INVOLVED

This case presents violations of the Sixth and Fourteenth Amendments to the United States Constitution, which are set out, in pertinent part, as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .

U.S. CONST. AMEND. VI.

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .

U.S. CONST. AMEND. XIV.

STATEMENT OF THE CASE

Petitioner will refer to the Joint Appendix by the designation "J.A." The trial record will be referred to by the date of the testimony and the page number.

On July 12, 1978, W. Jack Smith was killed in the Town of Franklin, in the County of Southampton, Virginia. Petitioner Willie Lloyd Turner was arrested and charged with capital murder, robbery, and using a sawed-off shot-

gun in the commission of a robbery. Because of prejudicial pre-trial publicity in Southampton County, a change of venue was granted, and the trial was moved to Northampton County, a thinly populated rural county on Virginia's Eastern Shore. The trial began on December 3, 1979. On December 4, 1979, the jury found Petitioner guilty of all charges. On December 6, 1979, the jury fixed his punishment at death. On February 6, 1980, Judge Godwin imposed the sentence of death upon Petitioner.

Petitioner's conviction and sentence were affirmed by the Virginia Supreme Court, *Turner* v. *Commonwealth*, 221 Va. 513, 273 S.E.2d 36 (1980), *cert. denied*, 451 U.S. 1011 (1981).

Petitioner's Petition for Writ of Habeas Corpus in the Circuit Court for the County of Southampton was denied, without an evidentiary hearing, and the Virginia Supreme Court refused to appeal. This Court denied a Petition for Writ of Certiorari. *Turner* v. *Morris*, *cert. denied*, ___ U.S. ___, 77 L.Ed.2d 1341 (1983).

On July 27, 1983, Petitioner filed a Petition for Writ of Habeas Corpus in the United States District Court for the Eastern District of Virginia, Norfolk Division, the Honorable John A. MacKenzie, presiding. Judge MacKenzie heard argument, denied Petitioner's motion for an evidentiary hearing, and entered an order dated May 23, 1984, denying relief but granting a certificate of probable cause. Petitioner then filed a Motion to Alter or Amend the Judgment, which was denied by order dated July 19, 1984.

The Fourth Circuit Court of Appeals affirmed the District Court's judgment by order dated January 25, 1985. This Court granted Petitioner's Petition for Writ of Certiorari on May 13, 1985. *Turner* v. *Sielaff*, *cert. granted*, ___ U.S. ___, 53 U.S.L.W. 3807.

STATEMENT OF FACTS

The Offense

On July 12, 1978, Willie Lloyd Turner, a black man, walked into Smith Jewelers in Franklin, Virginia, in the County of Southampton. Brandishing a sawed-off shotgun, he demanded that the proprietor, W. Jack Smith, a white man, fill up some bags with jewelry. Smith triggered the silent alarm, and moments later Officer A. D. Bain, Jr., arrived. Officer Bain walked in, unsuspecting; Turner then disarmed him and told him to stand in the back of the store with the rest of the customers who had been in the store at the time that Turner walked in. At Turner's order Smith began to fill bags with jewelry, when Turner apparently became concerned about the possibility that other police officers would come in the back. He fired a pistol shot into the back wall of the store. Officer Bain tried to reassure Turner that no police officer was going to come in the back; Bain testified that, at that point, Turner stated that "if he saw or heard any more police officers, he was going to start killing. About that time, I heard a siren go off." Turner apparently panicked, and fired Bain's service revolver at Smith, the shot grazing Smith's scalp. Smith fell to the floor.

In the confusion, one customer and one employee were able to sneak out the front door. Bain tried to talk to Turner, but Turner merely got angry. He said "I'm going to kill that nigger for snitching on me." He then shot Smith, who was lying on the floor, twice through the chest from the back. The two shots were fired in rapid succession, one right after the other. Either of the two shots to the chest would have been fatal. As Turner turned away from Smith, Officer Bain attacked him, disarmed him and placed him under arrest.

Evidence in Aggravation

The Commonwealth presented both aggravating circumstances, as provided in *Va. Code Ann.* § 19.2-264.2, to the jury, and presented evidence in support of the "future dangerousness" circumstances by introducing copies of the judgment orders of conviction from Turner's earlier convictions. Those orders showed the following convictions:

September 21, 1970—malicious maiming;

March 22, 1972—escape;

February 12, 1973—unlawful wounding;

September 26, 1973—malicious wounding;

March 21, 1974—second degree murder.

The last four offenses occured in prison.

Evidence In Mitigation

Turner offered the testimony of Dr. Robert C. Bransfield, a psychiatrist who had been appointed to assist the defense. Dr. Bransfield testified that he first obtained a family history, which showed that Turner was an abused child, growing up in a home with an alcoholic father who beat him regularly. As a child, Turner had begun to experience auditory hallucinations and nightmares (Dec. 5, 1979, at 60).

After the first interview, Dr. Bransfield made a tentative diagnosis of latent schizophrenia with paranoid features (*Id.* at 61), and he ordered psychological testing. Dr. Bransfield had also noted that Turner showed "depressive symptoms" and "psychotic tendencies," (*Id.* at 58); he prescribed Mellaril and imipramine, and both the

depressive and the psychotic symptoms showed improvement after administration of medication. After further testing, Dr. Bransfield concluded that Turner was an antisocial personality with paranoid tendencies, and that the psychotic symptoms "tended to come out more in times of stress." (*Id.* at 62). Dr. Bransfield then testified about the stresses that were impinging on Willie Turner on July 12, 1978, noting that the paranoid and depressive symptoms had been becoming more severe in the few weeks before the murder. Dr. Bransfield then testified that Turner "was under the influence of mental disturbance while he was committing the crime." (*Id.* at 69), and that "if he would have had treatment at that time, Mr. Smith would not have been killed." *Id.* at 98.

Petitioner's mother, Gussie Turner, testified that her son had been acting very strangely in the weeks before the offense—he seemed to be in a daze (*Id.* at 118), and playing with guns (*Id.* at 119). She called the police to ask them to help her son, and to get him some treatment (*Id.* at 121), but he never received any psychiatric help. Willie's counsin, Cora Kelly, testified that Willie's father drank heavily. *Id.* at 139. Finally, Willie's aunt, Lizzie Peebles, testified that he had never shown any signs of violence toward the family until May, 1978.

Voir Dire

The trial court conducted all *voir dire*, from written questions submitted by counsel. Turner's counsel submitted a number of questions, including the following:

> (10) The defendant, Willie Lloyd Turner, is a member of the Negro race. The victim, W. Jack Smith, Jr., was a white Caucasian. Will those facts prejudice you against Willie Lloyd Turner or affect your ability to render a fair and impartial verdict based solely on evidence?

The Court refused to *voir dire* the venire on their racial attitudes, to which refusal counsel objected.

The entire *voir dire* occupied 58 pages (Dec. 3, 1979, pp. 42-99) of transcript, and took less than two hours. During that two-hour period, 31 different veniremen were questioned—25 to get to a jury of 12, and six more to arrive at two alternates. In addition to selecting a jury during those two hours, though, the Court conducted other business. All 43 veniremen were asked to state their names, addresses and how far they lived from the court house; three sidebar conferences were held that were not transcribed (Dec. 3, 1979, pp. 42, 46, 55); counsel argued about exclusions for cause (pp. 48-49, 55-60, 65-68, 75-79, 86, 91); and counsel apparently made their peremptory strikes.

The only *voir dire* questions that elicited answers were the questions about the veniremen's views on the death penalty and whether they or members of their family had been victims of crime.

How This Question Was Treated Below

On direct appeal, counsel for Turner made myriad objections to the *voir dire*, including that counsel should have been permitted to participate in *voir dire* (this objection was made on both statutory and constitutional grounds), that the jury should not have been "death-qualified," that Samuel Cypress should not have been excused for cause, that the jury should have been questioned about racial prejudice, and that, taken as a whole, the *voir dire* was inadequate constitutionally. The Virginia Supreme Court found that there were no defects in the *voir dire*, and affirmed on all issues. All of the issues (except the state statutory argument on counsel's participation in *voir dire*) were presented to the federal

courts, with the major *voir dire* issue being the question that is presented here—whether the veniremen should have been questioned about their racial attitudes.

The Fourth Circuit affirmed, relying on *Ristaino* v. *Ross*, 424 U.S. 589 (1976), and *Rosales-Lopez* v. *United States*, 451 U.S. 182 (1981), to reject Turner's contention.

> There must exist some special circumstance in the facts surrounding a particular case before such voir dire is constitutionally required. We are of opinion that the nature of the crime or punishment itself is not a special circumstance. Nor is the fact that the victim is white and the defendant black, as *Ristaino* specifically so held. We are also of opinion that the fact that a larger percentage of white victims' assailants are executed than are other races is not a special circumstance. "There is no constitutional presumption of juror bias for or against members of any particular racial ethnic groups."

Turner v. *Bass*, 753 F.2d 342, 345 (4th Cir. 1985) (citing *Rosales-Lopez*, 451 U.S. at 190.)

Judge Phillips concurred, noting that he would make clear that particularized data relating specifically to jury prejudice at the time and place of trial might well constitute grounds for *voir dire* on that issue.

SUMMARY OF ARGUMENT

The recent executions in Richmond, Virginia, of Linwood Briley and James Briley have brought cheering, chanting crowds to the Virginia State Penitentiary, shouting "Fry, nigger, fry," and "Burn, Briley, burn." Members of the crowd wave Confederate flags and shout "White power" and "Sieg Heil" as they give Nazi salutes. Obviously, the enactment by the Virginia General Assembly of a post-*Gregg* death penalty statute has not ended bigotry in Virginia, and has not purged bigots from jury

lists. And while the post-*Gregg* statute has apparently contributed greatly to the reduction in the racial discrimination that attended the imposition of the death sentence in Virginia in years past, even the post-*Gregg* statutes require for their fair application vigilance against the intrusion of racial prejudice.

The starting point for such vigilance must be the jury selection process, and the fundamental question presented in this case is whether a black defendant accused of killing a white has a right to *voir dire* the jury panel to be sure to exclude those who favor the death penalty as weapon of bigotry.

The decisions of this Court—*Ham* v. *South Carolina*, 409 U.S. 524 (1973), and *Ristaino* v. *Ross*, 424 U.S. 589 (1976)—have set up a case-by-case analysis to determine whether a jury panel must be asked about possible racial prejudices. That case-by-case analysis requires reversal in a case such as this in which the jury was asked both to find guilt and set sentence in a capital case[1] in which the sentencing decision is not clear-cut, particulary where the *voir dire* is a perfunctory as it was in this case. Under such circumstaces Petitioner's Sixth Amendment right to a trial by an impartial jury and his Fourteenth Amendment right to due process of law have been violated.

ARGUMENT

At trial, Petitioner requested the court to ask the prospective jurors the following question:

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[1] The Georgia Supreme Court apparently regards this as its constitutional obligation in a capital case. *See Henderson* v. *State*, 251 Ga. 398, 306 S.E.2d 645 (1983), *citing Ham*, *supra*, and *Reid* v. *State*, 129 Ga. App. 657, 200 S.E.2d 454, 455 (1973).

> The defendant, Willie Lloyd Turner, is a member of the Negro race. The victim, W. Jack Smith, Jr., was a white Caucasian. Will those facts prejudice you against Willie Lloyd Turner or affect your ability to render a fair and impartial verdict based solely on the evidence?

The court refused to question the venire panel about racial prejudice.

I. THIS COURT HAS ADOPTED A CASE-BY-CASE ANALYSIS WHEN *VOIR DIRE* IS REQUESTED ON RACIAL ATTITUDES.

This Court has held that a defendant has a constitutional right to have veniremen examined on racial prejudice when there is some "special circumstance" about the trial that makes it likely that racial attitudes will be relevant. In *Ham* v. *South Carolina*, 409 U.S. 524 (1973), this Court reversed the conviction of a black civil rights worker in South Carolina who had been charged with possession of marijuana. His defense was that he had been framed in retaliation for his civil rights activities. He had asked that the jury be examined on racial attitudes, and that request was denied. The Court unanimously agreed that due process required that his jury panel be questioned concerning racial prejudice, but held, 7-2, that there was no reason to *voir dire* the jury concerning their feelings about people who wear beards. The Court obviously did not regard the possibility of prejudice against those wearing beards to be a matter of constitutional significance; the Court referred to the history of racial discrimination and the protection given by the Fourteenth Amendment to blacks in particular in drawing the distinction.

In *Ristaino* v. *Ross*, 424 U.S. 589 (1976), the Court held that *voir dire* on racial prejudice was not constitutionally

required, where the only factor that seemed to call for such *voir dire* was the fact that it involved a black defendant charged with armed robbery and assault upon a white security guard. The Court interpreted *Ham* as follows:

> By its terms *Ham* did not announce a requirement of universal applicability. Rather, it reflected an assessment of whether under all of the circumstances presented there was a constitutionally significant likelihood, absent questioning about racial prejudice, that the jurors would not be as 'indifferent as [they stand] unsworne.'

424 U.S. at 596. The Court noted in a footnote that

> In our heterogeneous society policy as well as constitutional considerations militate against the divisive assumption—as a *per se* rule—that justice in a court of law may turn upon the pigmentation of skin, the accident of birth, or the choice of religion.

Id. at n. 8.

The latest decision by this Court on this issue is *Rosales-Lopez* v. *United States*, 451 U.S. 182, 192 (1981), in which the Court, exercising its supervisory powers over federal courts, held that

> [f]ederal trial courts must make such an inquiry when requested by a defendant accused of a violent crime where the defendant and the victim are members of different racial or ethnic groups.

The Court refused to find that there was a constitutional requirement for *voir dire* on racial attitudes in that case, which involved a Mexican who was helping other Mexicans to enter the United States illegally. Justice White, writing for the plurality, noted that there is not "presumption of juror bias."

> Only when there are more substantial indications of the likelihood of racial or ethnic prejudice affecting the jurors in a particular case does the trial court's denial of a defendant's request to examine the jurors' ability to deal impartiality with [racial prejudice] amount to an unconstitutional abuse of discretion.

451 U.S. at 190.

The question, therefore, is whether there are "more substantial indications" then in *Ristaino* v. *Ross* or *Rosales-Lopez* that racial prejudice would affect the jurors.

An examination of the record in *Rosales-Lopez* v. *United States*, shows no indication that the defendant there tried to establish the likelihood of racial prejudice. In the absence of any evidence, and there being no presumption of racial prejudice, there was no basis in the record for any finding that the defendant was entitled to such *voir dire*.

Here, however, we are not asking the courts to indulge in a "presumption" of prejudice; we ask only that actual evidence offered by considered. It appears from this Court's opinions in *Rosales-Lopez* and *Ristaino* that no evidentiary showing was made in support of "the presumption of juror bias." We do not ask this Court to assume anything, or to presume anything. We ask only that this Court look at the facts. We have proffered in two courts below evidence that is credible and reliable. No evidentiary hearing has yet been held on this issue. This case is therefore not governed by *Ristaino* and *Rosales-Lopez*.

II. THIS CASE INVOLVED "MORE SUBSTANTIAL INDICATIONS OF THE LIKELIHOOD OF RACIAL PREJUDICE AFFECTING THE JURORS."

Although nothing about the facts of *crime* suggests racial animus, there are a number of circumstances sur-

rounding the case *as it came to court* that are "substantial indications of the likelihood of racial prejudice affecting the jurors." *Rosales-Lopez* v. *United States*, 451 U.S. 182, 190 (1981).

— Turner is a poor black; his victim was white, and a successful small businessman.

— Virginia has a history of imposing the death sentence disproportionately against blacks and against those who kill whites. There are still many people in Virginia who apparently regard electrocution as being more often appropriate for black defendants.

— Because of inflammatory pretrial publicity, venue had been changed to Northampton County, a rural county 150 miles away, with which neither counsel nor the court were familiar.

— Counsel was not permitted to participate in *voir dire;* the judge conductd a very cursory *voir dire*, which lasted less than two hours and which elicited virtually no information about any of the jurors except their views on the death penalty.

— Virginia allows only four peremptory challenges in a capital case—the fewest of any state in the country.

— This was a capital murder case, in which the death penalty was to be imposed by the jury based on their own subjective feelings about whether Willie Turner "deserved" death.

— This was a "mid-range" case—a bungled robbery, not particularly aggravated, with psychiatric evidence that tended to establish the existence of a statutory mitigating circumstance.

— Statistical evidence indicates that the influence of racial prejudice in the decision to sentence to death is most pronounced in "mid-range" cases.

— Under Virginia practice, the jury recommendation on sentence is virtually conclusive; the trial judge cannot impose the death sentence if the jury returns with a verdict of life, and the judge's power to reduce a death sentence handed down by the jury has been infrequently used.

— The Virginia Supreme Court has never found a death sentence to have been imposed under passion or prejudice, and has never found a jury's determination of an aggravating circumstance to be unjustified or a death sentence to be disproportionate.

Given all of these circumstances, the trial court erred in refusing counsel's timely request to not question the veniremen about their possible racial prejudices.

A. The Race Of The Victim And The Defendant.

Petitioner is a black man; his victim, W. Jack Smith, was a white man. The jury became aware of Mr. Smith's race when the Commonwealth introduced, through the medical examiner, a photograph (Commonwealth's Exhibit 10) of an entrace wound in Mr. Smith's head, a photograph (Commonwealth's Exhibit 11) of the exit wound from Mr. Smith's head, and a photograph (Commonwealth's Exhibit 12) of Mr. Smith's chest, showing two entrance wounds.[2]

B. The Death Penalty Has Historically Been Applied Discriminatorily In Virginia.

1. The Death Penalty Before *Furman* v. *Georgia*.

Before *Furman* v. *Georgia*, 408 U.S. 238 (1972), the death sentence was applied in Virginia in a racially dis-

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[2] The defense objected to the photographs on the ground that they would inflame or prejudice the jury, but that objection was overruled. The Virginia Supreme Court affirmed. *Turner* v. *Commonwealth*, 221 Va. 513, 531, 273 S.E.2d 36 (1980), *cert. denied*, 451 U.S. 1011 (1981).

criminatory fashion. Before the Civil War, the Virginia Code provided for different punishment for whites, free blacks and slaves.

> Virginia law at the outbreak of the Civil War divided criminals into three classes. For whites, the law authorized capital punishment only for murder, treason, and arson. Free Negroes could receive the death penalty for these three offenses plus rape and attempted rape, if the victim were white. In addition, the state could execute slaves for burglary, armed robbery, kidnapping and any other offense which was punishable by imprisonment for more than three years if committed by a free man.

Note, "Capital Punishment In Virginia," 58 Va. L. Rev. 97, 104-105 (1972).[3]

Following the Civil War and the enactment of the Fourteenth Amendment, the Virginia General Assembly abolished the clear race-dependent differences, added burglary, armed robbery, rape and (in 1984) attempted rape to the list of capital offenses, and controlled jury selection to guarantee all white juries.

> Since the legislature apparently felt it impolitic to distinguish penalties by race, they made the death

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[3] The Virginia General Assembly in the 1800's considered the "death worthiness" of certain cases to be a function not only of the race of the offender but also of the victim. The rape statute, for example, expressly

> provided that if a slave or free Negro raped a white woman he was to be punished with death. The original penalty for the attempted rape of a white woman by a black man was castration, but later the legislature extended the death penalty to cover that crime also. In contrast, the law offered little protection to a black woman raped by a white man. The maximum penalty was only a term of imprisonment, and Negroes were incompetent by statute to testify against a white criminal defendant. Without the testimony of the victim, proving such essential elements of the crime of rape as force and penetration would obviously present certain practical difficulties.

Id. at 104.

> penalty discretionary for these crimes, and placed their trust in the judgment of white judges and white juries.

Id. at 106.

In 1908, Virginia executions were centralized in the Virginia State Penitentiary, and the Department of Corrections has kept records of those who have been executed since then. (No authoritative data exists for pre-1908 executions.) Between 1908 and 1962, 236 people were executed in Virginia; 202 were black. Forty-one blacks were executed for rape, fourteen blacks executed for attempted rape, and five blacks executed for armed robbery. No whites were executed for those three offenses. *Id.* at 142.

When all Virginia death sentences were nullified in 1972 in *Furman* v. *Georgia*, there were eight men on Virginia's death row; five were black and three were white. Six were on death row for murder, and two (both black) were on death row for rape. *Id.* at 113 n.107.

Even more striking are the statistics correlating the imposition of the death sentence with the race of the victim. Between 1908 and 1962, no one was executed for a crime against a black victim.

In sum, therefore, the disparity on the basis of race of the offender or race of the victim in the imposition of the death sentence in Virginia before *Furman* v. *Goergia* was "sufficiently large" that "it is unlikely that it is due solely to chance or accident," *Casteneda* v. *Partida*, 430 U.S. 482, 494 n.13 (1977). This statistical disparity, combined with the history of racial discrimination in Virginia's courts, fully supports a conclusion that, at least before 1972, racial prejudice was an important factor in determining who was sentenced to death in Virginia.

2. This Court's Holding In *Furman* Was Based In Large Part On Evidence Of Racially Discriminatory Application.

When this Court struck down capital sentencing procedures in *Furman* v. *Georgia*, 408 U.S. 238 (1972), five justices, representing seven votes, addressed race discrimination in their individual opinions. *See* 408 U.S. at 249-52 (Douglas, J., concurring); *id.* at 309-10 (Stewart, J., concurring); *id.* at 364-66 (Marshall, J., concurring); *id.* at 389-90 n.12 (Burger, C. J., dissenting); *id.* at 449 (Powell, J., dissenting).

The thrust of the argument to this Court in 1972 was that the death penalty was being imposed on the basis of race, as shown by many statistical studies. *See, e.g.*, H. Bedau, *The Death Penalty in America* (1967 rev. ed.); Hartung, "Trends in the Use of Capital Punishment," 284 Annals Am. Acad. of Pol. & Soc. Sci. (1952); R. Clark, *Crime in America* 335 (1970); Wolfgang, Kelly & Nolde, "Comparison of the Executed and the Commuted Among Admissions to Death Row," 53 J. Crim. L. Criminology & Police Sci. 301 (1962). Justice Marshall summarized the statistics as follows:

> It is immediately apparent that Negroes were executed far more often than whites in proportion to their percentage of the population. Studies indicate that while the higher rate of execution among Negroes is partially due to a higher rate of crime, there is evidence of racial discrimination.

408 U.S. at 364. *See also* W. Bowers, Executions in America (1974).

Even the dissenters in *Furman* apparently conceded that the death sentence had historically been imposed pursuant to a racially discriminatory pattern. Justice Powell, writing for himself, Chief Justice Burger, Justice

Blackmun, and Justice Rehnquist, called the "discriminatory application of the death penalty in the past admittedly indefensible." 408 U.S. at 450.

3. The Reliance On Prophylactic Procedural Changes.

The many opinions in *Furman* v. *Georgia* broke down essentially into those who felt that the arbitrary and capricious imposition of the death penalty required major change, and those who felt that the natural evolution of criminal law was making irrelevant the statistics of past discrimination. Justice Powell's dissent, in which he wrote for himself, Chief Justice Burger, Justice Blackmun, and Justice Rehnquist, commented that

> [t]he possibility of racial bias in the trial and sentencing process has diminished in recent years. The segregation of our society in decades past, which contributed substantially to the severity of punishment for inter-racial crimes, is now no longer prevalent in this country. Likewise, the days past when juries do not represent the minority group elements of the community. The assurance of fair trials for all citizens is greater today than at any previous time in our history. Because standards of criminal justice have "evolved" in a manner favorable to the accused, discriminatory imposition of capital punishment is far less likely today than in the past.

408 U.S. at 450. Four members of the court were saying, in essence, that procedural guarantees, representation of blacks on juries, and generally heightened sensitivity to the possibility of racial prejudice may be relied upon to prevent racial prejudice from infecting the entire system of the administration of justice to the extent that it had in years past. The dissenters in *Furman* rejected the claims of systematic discrimination, and they (and now the majority of this Court) have instead placed the emphasis on the more mundane issues—on Fifth and Sixth Amend-

ment claims, for example, rather than on Eighth Amendment claims.

This Court has consistently recognized that the "qualitatively different" nature of the punishment in capital cases leads to a "heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case.' *Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976)," *Caldwell* v. *Mississippi*, 53 U.S.L.W. at 4744, requiring "a correspondingly greater degree of scrutiny of the capital sentencing determination," *California* v. *Ramos*, 77 L.Ed.2d at 1179.

Capital cases often present familiar Fifth and Sixth Amendment issues in different factual and legal contexts, and the Court has not hesitated to apply these old doctrines to new fact situations in capital cases where necessary to protect those rights. *See Ake* v. *Oklahoma*, 470 U.S. ___, 84 L.Ed.2d 53 (1985); *Estelle* v. *Smith*, 451 U.S. 454 (1981); *Bullington* v. *Missouri*, 451 U.S. 430 (1981). In *Ake* and *Estelle* v. *Smith*, the Court recognized that if the sentencing process is unfair or permits the injection of unreliable or arbitrary factors, there can be no confidence in the result of that process.

Nothing in Justice Powell's dissent in *Furman*, or elsewhere in this Court's Eighth Amendment jurisprudence, supports the suggestion that a post-*Furman* death penalty statute guarantees that the result in a particular case will always be fair and unbiased. *Furman* addressed itself only to systemic discrimination, not bias in a particular case.

Justice Powell was obviously correct in stating that the level of segregation has declined in recent years, as blacks and whites have broken down the barriers of segregation. This Court's rulings in the area of school desegregation

have, themselves, probably done more than anything else to bring about a change in the attitudes of prospective jurors.

However, the decisions of this Court do not magically change the hearts and minds of the populace. *Strauder* v. *West Virginia*, 100 U.S. 303 (1880), forbade excluding blacks from juries, but the inventiveness of local officials in constructing Jim Crow laws continued to keep blacks off juries in most jurisdictions in the South. *Strauder* laid down the law, but that law was not followed until the massive societal and political changes of the 1960's.[4]

Similarly, racial prejudice was not abolished in our society by this Court's decision in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), and racial prejudice was not eliminated from the minds of those who are called to serve on our juries by this Court's decision in *Furman*.

4. The Death Penalty After *Furman* and *Gregg*.

After *Furman*, the Virginia General Assembly adopted a mandatory death penalty statute of the type struck down in *Woodson* v. *North Carolina*, 428 U.S. 280 (1976). Also in 1976, of course, this Court approved new statutes that guided the discretion of the jury so as to eliminate the arbitrary and capricious manner in which death was being imposed. *Gregg* v. *Georgia*, 428 U.S. 153 (1976). After the Court's 1976 decisions, the General Assembly adopted the current statutory scheme.

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[4] Virginia officials used literacy tests and imposed a poll tax to exclude blacks from the voting lists (a practice ruled unconstitutional in *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966)), then used the voting lists as the pool from which the usually all-white jury commissioners would hand-pick prospective jurors.

Statistical evidence shows that the racially discriminatory impact noted before *Furman* is less pronounced now, but that discriminatory impact has not disappeared. Statistical studies have correlated death sentences with the race of the victim and the race of the offender. The evidence has shown that blacks are more likely to receive the death penalty than whites, and those who kill whites are more likely to receive the death penalty than blacks.[5] The only study of Virginia patterns that is in evidence is the study by Gross and Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing in Homicide Victimization* 15-32 (unpublished study) (October, 1983). As is set forth in greater detail *infra*, Professors Gross and Mauro found that since 1977, a black who kills a white is six times more likely to be sentenced to death than a white who kills a white. No such comparison is available for black victims, because no white has ever been sentenced to death for the murder of a black.

Statistics, of course, have often been used as circumstantial evidence of discriminatory intent; statistics may in some cases be "so strong that the only permissible inference is one of intentional discrimination." *Adams* v. *Wainwright*, 709 F.2d 1443, 1449 (11th Cir. 1983), *cert. denied*, ___ U.S. ___, 79 L.Ed.2d 203 (1984); *McCleskey*

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[5] Petitioner was proffered two studies tending to show that the death penalty is being imposed discriminatorily upon blacks, and in particular on blacks who kill whites. At trial, Petitioner introduced a study by Bowers and Pierce (Defendant's Exhibit 1); after having been denied an evidentiary hearing on this issue, Petitioner proffered as an exhibit to his Motion to Alter or Amend Judgment the study by Gross and Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing in Homicide Victimization* 15-32 (unpublished study) (October, 1983).

v. *Kemp*, 753 F.2d 877, 892 (11th Cir. 1985) (en banc); *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1880).

The courts have rejected the oft-asserted claim that the death penalty is being imposed discriminatorily. *McCleskey* v. *Kemp*, 753 F.2d 877 (11th Cir. 1985) (en banc); *Shaw* v. *Martin*, 733 F.2d 304 (4th Cir. 1984); *Sullivan* v. *Wainwright*, 721 F.2d 316 (11th Cir. 1983); *petition for stay of execution denied*, ___ U.S. ___, 78 L.Ed.2d 210 (1983); *Adams* v. *Wainwright*, 709 F.2d 1443 (11th Cir. 1983), *cert. denied*, ___ U.S. ___, 79 L.Ed.2d 203 (1984); *Spinkellink* v. *Wainwright*, 578 F.2d 582 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979).

Some of these decisions have been based on concerns about the methodology of the studies, *see McCleskey, supra*, at 896; *Sullivan, supra*, at 213; other opinions have simply concluded that the statistical evidence was not "so strong that the only permissible inference is one of intentional discrimination." *Adams, supra*, at 1449.

However, that body of case law is directed to an altogether different kind of claim from that asserted by Petitioner. We do not bring this evidence to this Court in this Brief in support of the *Spinkellink/McCleskey/Sullivan* claim that the entire statutory scheme must be invalidated on account of discriminatory impact; the evidence is offered to show that there continues to be a statistical indication that racial bias may affect the sentencing decision, and that that indication is strong enough that a state trial court should take reasonable steps to determine whether there are any people on the jury who feel that the death penalty is more often appropriate for blacks who kill whites.

C. The *Voir Dire* In This Case Was Inadequate To Search Out Prejudices, Racial Or Otherwise.

1. Since There Had Been A Change Of Venue To A Distant Rural County, Neither Counsel Nor The Judge Was Familiar With The Community From Which The Veniremen Came.

Southampton County is a county of 18,731 people. (All population figures are from Bureau of Census, *1980 Census of Population*, Vol. 1, Chapter B, Part 48 (Virginia) (1982).) While it is largely rural, it is just southwest of the Norfolk/Portsmouth metropolitan area, where almost 700,000 people live (including the cities north of the James River, the Tidewater Virginia metropolitan area exceeds 1.3 million people). The largest town is Franklin, with 7,308 people.

Northampton County is a county of 14,625 people. It is completely rural; the largest town, Cape Charles, has 1,512 people. It is on the Eastern Shore of Virginia, separated from the rest of the state by the Chesapeake Bay.

While Northampton County is just as close as Southampton County is to the Norfolk/Portsmouth metropolitan area, it is a totally different kind of community sociologically. Southampton County has many residents who commute to jobs in the cities; very few do so in Northampton County, since the one-way fare on the Chesapeake Bay Bridge-Tunnel is approximately $20.00. It is probably fair to say that the Eastern Shore has, for most of Virginia's existence, been a tranquil backwater, whereas Southampton County is a bit closer to the mainstream of Virginia life and politics.

The similarities between the two counties are such that a change of venue from Southampton County to Northampton County was not unreasonable, and Petitioner has

never quarreled with the choice of Northampton County as the site for his trial. But the differences between the two counties should have put the trial judge on notice that he might not understand the sociology of the community from which the jury pool was drawn in the same way that he no doubt understands the sociology of Southampton County, where he practiced law and had presided at trial.

In Virginia, judges sit in particular circuits, and do not sit in other circuits except by designation by the Chief Justice of the Virginia Supreme Court in a particular case. The circuit from which Judge Godwin comes, where he practiced law before coming to the bench, and where he sits regularly, is entirely in the cities and counties southwest of Norfolk and Portsmouth. The judge who sits on the Eastern Shore, on the other hand, tends to sit in those two counties most of the time, and sits in the City of Virginia Beach the rest of the time. The two circuits do not overlap, and there is no reason to believe that Judge Godwin, who presided in this case, had any familiarity with the community in Northampton County.

This Court has reposed its confidence in trial judges on matters of *voir dire*, in part because the trial judge can evaluate the venireman's responses and demeanor personally. While this Court has never said so explicitly, it is probably also fair to surmise that that confidence is also a function of the trial judge's superior knowledge of the community from which the jury is drawn. Trial judges in their home counties come to know the citizenry, and their acquaintance with the citizens informs their decisions on *voir dire*. Their familiarity with local customs and media practices informs their decisions to sequester the jury. In short, this Court's reliance on the trial judges is based in part on respect for their local knowledge.

Here, the local knowledge did not exist, and the judge did not take any action to fill that void with meaningful *voir dire*. The deference thus accorded to the trial judge's decisions on *voir dire* is correspondingly reduced.

2. The *Voir Dire* Took Less Than Two Hours, And Touched Only On Whether The Jurors Could Impose The Death Penalty And Whether They Had Ever Been Victims Of Crime.

In *Ristaino* v. *Ross*, this Court upheld the robbery conviction of James Ross, finding that the *voir dire* that had in fact been conducted was a "more generalized but thorough inquiry into the impartiality of the veniremen." 424 U.S. at 598. The Court noted that 18 veniremen were excused "for cause on grounds of prejudice, including one panelist who admitted a racial bias." *Id.* at 593. *Voir dire* apparently covered at least 117 pages of transcript (pp. 430-547 of the transcript). Even though *voir dire* was not conducted on the issue of racial prejudice, the trial judge did question the jury on the related issue of prejudice because the victim was a security guard. At least one of the defense's concerns about prejudice relating to the identity of the offender and the victim was addressed.

Similarly, in *Rosales-Lopez*, the trial judge did not ask exactly the question posed by the defense about prejudice based on race, but he did ask whether the veniremen had any prejudice against aliens. 451 U.S. at 186. Since the defendant was obviously Mexican, was charged with illegally transporting aliens into the country, and was being tried in the Southern District of California where the problem of illegal aliens is rarely far from the consciousness of most of the citizenry, it is fair to say that the jurors had their attention drawn to the potential for prejudice against Mexicans.

> There can be no doubt that the jurors would have understood a question about aliens to at least include Mexican aliens. The trial court excused two jurors for cause, based on their responses to this question. Removing these jurors eliminated, we believe, any reasonable possibility that the remaining jurors would be influenced by an undisclosed racial prejudice toward Mexicans that would have been disclosed by further questioning.

451 U.S. at 193 (White, J., for the plurality). Justice White also recognized that the fact that the general question about whether the jurors knew of any reason why they could not be fair and impartial followed the other *voir dire* about alienage made it unlikely that a juror would have responded differently to a direct question related specifically to race.

The *voir dire* in this case was not a "thorough inquiry" into possible prejudice. The *voir dire* occupied only 58 pages of transcript, 19 pages of which were taken up with legal argument. Virtually all of the *voir dire* was on *Witherspoon* issues; there was also some discussion with some jurors who had been victims of crime. No other issues of prejudice were discussed.

This Court has found no need for asking a particular question on possible racial prejudice in two cases in which the *voir dire* was otherwise thorough and focused on particular related areas of possible prejudice. The general inadequacy of the *voir dire* in this case sets this case apart from either *Ristaino* v. *Ross* or *Rosales-Lopez* v. *United States*.

3. Virginia Allows The Defense Only Four Peremptory Challenges In A Capital Case, The Lowest Number Of Any State In The Country.

In Virginia, juries in felony cases are twelve-member juries, selected from a panel of twenty; each side strikes

four members. *Va. Code Ann.* § 19.2-262 (1975 Repl. Vol.). There is no higher number in capital cases.

The American Bar Association recently recommended the process of striking a jury, and recommended that each side be permitted 10 strikes in a capital case. ABA Standards Relating to Juror Use and Management, Standard 9(d)(i) (1983). The range in capital cases across the country, according to the ABA study, was from 4 to 26 for the defendant. *See also* J. Van Dyke, *Jury Selection Procedures, Our Uncertain Commitment to Representative Panels* 282-285 (1977).

In *Swain* v. *Alabama*, 380 U.S. 202 (1965), the defendant was permitted 21 peremptory strikes, and the Court noted that defendants in trials for felonies were permitted at common law 35 strikes. *Id.* at 212. This was codified by Congress, though the number was reduced to 20 in a federal capital case in 1865. *Id.* at 214.

This Court noted that American *voir dire*

> tends to be extensive and probing, operating as a predicate for the exercise of peremptories, and the process of selecting a jury protracted. The persistence of peremptories and their extensive use demonstrate the long and widely held belief that peremptory challenge is a necessary part of trial by jury.
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> * * * *
>
> The function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise.

Id. at 219.

Petitioner is not arguing that he was denied a fair trial because Virginia allows him only 4 peremptory chal-

lenges. But the fact that Virginia is so restrictive has two implications. First, any change to require *voir dire* on racial prejudice will not take long, because the number of jurors who would be asked the additional question or questions would likely be few indeed. Second, the fact that defendants in Virginia have little other opportunity to "eliminate extremes of partiality" is but another circumstance tending to indicate that extensive *voir dire* is necessary. When peremptory strikes are so few, they are precious and cannot be wasted on hunches and surmise unsupported by anything other than a look at the smile on the juror's face.

D. Virginia Vests Broad Discretion In Juries That Decide Whether To Sentence The Defendant To Death.

1. This Court Has Authorized Giving The Sentencer Broad Discretion In Capital Cases.

This Court has enunciated two basic principles that govern jury deliberations in capital cases.

First, the capital sentencing statute must in some way legitimately narrow the class of cases to which the death penalty may be applied, providing the sentencer some valid penological reason to impose the death sentence in one case but not in another. *Godfrey* v. *Georgia*, 446 U.S. 420, 428-429 (1980); *Zant* v. *Stephens*, ___ U.S. ___, 77 L.Ed.2d 235, 250-251 (1983). Not only must the aggravating circumstances (to use the Virginia statute's construction) actually provide a rational basis for deciding who dies, but the aggravating circumstances cannot implicate other protected rights. A state cannot attach

> the "aggravating" label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as for example the race, religion, or political affiliation of the defendant.

Zant v. *Stephens*, *supra*, at 255.

Second, the defendant is entitled to an "individualized determination" of the appropriateness of the death sentence in his particular case. *Lockett* v. *Ohio*, 438 U.S. 586 (1978); *California* v. *Ramos*, ___ U.S. ___, 77 L.Ed.2d 1171, 1180 (1983).

Once a threshold level of aggravation has been crossed, the Constitution does not require that any particular substantive criteria be applied by the sentencer in arriving at the decision whether to impose death. *Gregg* v. *Georgia*, 428 U.S. 153, 203-204 (1976):

> We think that the Georgia court wisely has chosen not to impose unnecessary restrictions on the evidence that can be offered at such a hearing and to approve open and far-ranging argument . . .

See also California v. *Ramos*, ___ U.S. ___, 77 L.Ed.2d 1171, 1180 (1983). In *Zant* v. *Stephens*, 77 L.Ed.2d at 248, this Court approved

> a scheme that permits the jury to exercise unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty by statute.

Most recently, this Court reversed a death sentence because of prosecutorial misconduct in final argument, noting the difficulty of the decision with which the jury was faced.

> A capital sentencing jury is made up of individuals placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice. They are confronted with evidence and argument of the issue of whether another should die, and they are asked to decide that issue on behalf of the community. Moreover, they are given only partial guidance as to

> how their judgment should be exercised, leaving them with substantial discretion.

Caldwell v. *Mississippi*, ___ U.S. ___, 53 U.S.L.W. 4743, 4746 (June 11, 1985).

This Court has relied upon thorough and discerning appellate review to guard againt arbitrary and capricious imposition of the death penalty, *Zant* v. *Stephens*, 77 L.Ed.2d at 248, but there is nonetheless a recognition that the jury's role in a capital sentencing proceeding is "essentially unreviewable and not always rational." *Spaziano* v. *Florida*, ___ U.S. ___, 82 L.Ed.2d 340, 349 (1984). Cf. *Arizona* v. *Rumsey*, ___ U.S. ___, 81 L.Ed.2d 164 (1984). And no amount of appellate review will change the fact that the decision to impose death is often a

> highly subjective, "unique, individualized judgment regarding the punishment that a particular person deserves." *Zant* v. *Stephens*, 462 U.S. 862, 900 (1983) (Rehnquist, J., concurring in the judgment). It is beyond question that an appellate court, performing its task with a presumption of correctness, would be relatively incapable of evaluating the "literally countless factors that [a capital sentencer] consider[s,]" *id.*, at 901, in making what is largely a moral judgment of the defendant's desert.

Caldwell, *supra*, at 4748 n.7.

A "largely moral judgment of the defendant's desert" will always defy objectification.

> We have never suggested that the United States Constitution requires that the sentencing process should be transformed into a rigid and mechanical parsing of statutory aggravating factors. But to attempt to separate the sentencer's decision from his experiences would inevitably do precisely that. It is entirely fitting for the moral, factual, and legal judg-

> ment of judges and juries to play a meaningful role in sentencing. We expect that sentencers will exercise their discretion in their own way and to the best of their ability. As long as that discretion is guided in a constitutionally adequate way, and as long as the decision is not so wholly arbitrary as to offend the Constitution, the Eighth Amendment cannot and should not demand more.

Barclay v. *Florida*, ___ U.S. ___, 77 L.Ed.2d 1134, 1144 (1983).

2. Under Virginia Law And Practice, A Jury's Recommendation Of Sentence Is Virtually Conclusive.

Under Virginia law, the jury makes only a recommendation to the judge; if that recommendation is for life imprisonment, the judge simply enters judgment, because he or she has no power to raise the punishment to death. If the jury returns with a recommendation of death, the judge has the power to sentence the defendant to life imprisonment. This power, given by *Va. Code Ann.* § 19.2-264.5 (Cum. Supp.), has virtually never been used. Virginia juries have returned the death sentence 39 times since the new statutes went into effect on July 1, 1977. In only two of those 39 cases has the judge refused to impose a jury-recommended death sentence.[6]

Though the Virginia Supreme Court is required by statute to review all death sentences to protect against arbitrary or capricious infliction of the death sentence, the Virginia Supreme Court has never found a death

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[6] Both cases involved white defendants—Keith Rohauer, in the Circuit Court for the County of Goochland (2/2/80), and Robert McClark, in the Circuit Court for the City of Danville (5/9/85). There are currently 28 men on Virginia's death row; four have died while on death row (three by execution). Of those 32 men, 18 are black, one is Asian, one was Mexican and 12 are white.

sentence to be imposed pursuant to passion or prejudice or to be disproportionate. The Virginia Supreme Court has never found any defect in the sentencing phase of a capital trial. The Court has reversed four death sentences—three for *voir dire* errors, *Justus* v. *Commonwealth*, 220 Va. 971, 266 S.E.2d 87 (1980), death sentence affirmed on appeal after retrial, 222 Va. 667, 283 S.E.2d 905 (1981); *Martin* v. *Commonwealth*, 221 Va. 436, 271 S.E.2d 123 (1981); and *Patterson* v. *Commonwealth*, 222 Va. 653, 283 S.E.2d 212 (1981); and one because there was no evidence that the defendant was the triggerman, as is required as an element of capital murder under Virginia law, *Johnson* v. *Commonwealth*, 220 Va. 146, 255 S.E.2d 525 (1979). The meaningful appellate review so prized by this Court as a guarantee againt arbitrariness and capriciousness simply has not been forthcoming from the Virginia Supreme Court.

Neither the trial court nor the Virginia Supreme Court is likely to disturb a jury determination of sentence.

E. The Process By Which A Jury Decides Whether To Impose A Death Sentence Creates A Significant Likelihood That Racial Biases Will Be Affect The Jury's Decision, Particularly In A Mid-Range Case Such As This.

This Court has noted, *see Gregg* v. *Georgia*, 428 U.S. 153 (1976), that a sentencing jury must weigh retribution, deterrence, and other matters of social policy. *See also Spaziano* v. *Florida*, *supra*, 82 L.Ed.2d at 353. These are proper concerns for a sentencing jury, and are irrelevant to any other decision that any other jury would be called upon to make.

In a capital case, in which the jury imposes the sentence, the decision to impose the death sentence is intended to be, and in fact becomes, an effort to express

the "community's voice," *id.* at 354, of retribution. A majority of the justices of this Court have agreed that retribution is a valid penological purpose served by the death penalty. *See Furman* v. *Georgia*, 408 U.S. at 453 (Powell, J., dissenting) (joined by Burger, C. J., Blackmun, Rehnquist, JJ.); *Gregg* v. *Georgia*, 428 U.S. 153, 183 (1976) (Stewart, Powell, Stevens, JJ., concurring).

Virginia's "vileness" criterion is expressly intended to address the question of retribution. Whether the defendant's conduct was "outrageously or wantonly vile, horrible or inhuman" focuses the jury's deliberations on the degree of horror and revulsion which they feel about the crime and the defendant.

1. Particularly In The South, A Communal Desire For Retribution Has All Too Often Produced Lynch Mobs.

Blacks accused of crimes against whites have known all too often the power of racially motivated retribution. Within the legal system, this retribution has led to a wide disparity in sentencing, as jurors valued white lives more than black lives.[7] Outside the courts, blacks have often

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[7] The bare statistics cited elsewhere in this Brief are disturbing as indicators of prejudice, but they to a certain extent obscure the rabid feelings held by some. Perhaps the classic statement of how racial prejudice affects the criminal justice system is provided by Raymond Fosdick, a student of southern police methods in the early 1900's. One Southern policeman told Fosdick that "if a nigger kills a white man, that's murder. If a white man kills a nigger, that's justifiable homicide. If a nigger kills a nigger, that's one less nigger." C. Silberman, *Criminal Violence, Criminal Justice* 124 (1978).

been lynched upon a mere accusation of murder, rape, or other crime against white victims.[8]

The analogy to lynching is not mere rhetorical excess; Justice Stewart suggested, in essence, that the death penalty, imposed by government, was a substitute for lynching:

> In part, capital punishment is an expression of society's moral outrage in particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs.
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> "The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people believe that organized society is unwilling or unable to impose upon criminal defenders the punishment they 'deserve,' then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law."

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[8] Of 4,733 lynchings recorded in the United States between 1882 and 1968, 72.7% of the lynchings were of blacks. In Virginia, 83 of 100 lynching victims were black. R. Zangrando, *The NAACP Crusade Against Lynching, 1909-1950* 5 (1980). As Zangrando notes, the statistics do not include "legal lynchings" in which the trial was a sham and a mere prelude to the foregone conclusion of execution. *See Powell* v. *Alabama*, 287 U.S. 45 (1932).

Gregg, *supra*, at 183, quoting *Furman* v. *Georgia*, *supra*, at 308 (Stewart, J., concurring). The Virginia Supreme Court justified the death penalty for attempted rape[9] by using the same analysis:

> The likelihood of the resort to lynch law, unless there is a prompt conviction and a severe penalty imposed, and thus a resultant grave shock to the peace and dignity of the Commonwealth, is well known to exist, almost, if not quite equally, in the case of an attempted as of a consummated rape.

Hart v. *Commonwealth*, 131 Va. 726, 747, 109 S.E. 582 (1921).

In the normal criminal trial in most states, the judge sets the sentence, and the jury has no cause to address itself specifically to the issue of retribution. In *Ristaino* v. *Ross*, the jury was only making a finding of guilt; they were not imposing sentence. They were asked to apply the law to the facts; their job did not call for expressing retribution or declaring social or penological policy.

2. Although The Last Lynching Was More Than Twenty Years Ago, Racial Prejudices Still Affect The Decision To Impose The Death Penalty.

Racial tensions have eased, and our society has become much more open and accepting of those with different backgrounds. The last true lynching in the South was in 1964. But the problems of bigotry have not vanished by this Court's decree.

There is no escaping some basic aspects of human nature. Different jurors perceive blacks and whites differently. In their classic study, Kalven & Zeisel noted that

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[9] It will be remembered that only blacks have been executed in Virginia for attempted rape.

jurors tend to be less sympathetic to black defendants than to white defendants; less sympathetic jurors are more likly to convict, and are more likely to impose the death sentence. H. Kalven and H. Zeisel, *The American Jury* 210 (1966). Jury sentencing trials necessarily involve asking the jurors to act as the conscience of the community in imposing punishment. They are not merely applying facts to issues of law in determining guilt; they are also, to a certain extent, defining the law of punishment. When a jury is faced with a range of punishment from one day to five years in jail (as with a Class 6 felony in Virginia), there are no strict legal standards governing their decisions. Whether the jury recommends one day in jail or five years in jail is a function of purely subjective factors of whether the jurors like, respect, trust, excuse, empathize with, or take pity on a defendant. They are shaping very rough subjective standards into a collective community standard—the conscience of the community. If that conscience reflects racial prejudice,[10] there is an unacceptably greater chance that the black defendant will be more harshly treated.

Had there been any doubt that racial prejudice continues to affect people's perceptions of the validity of the death penalty in a given case, those doubts should have been dispelled by recent events in Virginia. On October 12, 1984, Linwood Briley was executed in Richmond, Virginia, as hundreds of whites stood outside the Virginia State Penitentiary waving Confederate flags and nooses, chanting "Burn, Briley, burn," and "Fry, nigger, fry." The Richmond News Leader reported:

> But race was an issue for some who came out last night. Two women carried signs that said "Kill the

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[10] Of course, racial prejudice is no more permissible in a juror merely because it is an attitude widely held in the community.

> Negro." A white youth spiced his screams of "Fry 'em" with racial epithets and obscentities.

"Prison Vigil: Street Divides Advocates, Opponents of Death Penalty," Richmond News Leader, October 13, 1984, at 1, col. 1. The Washington Post reported:

> Ron Doggett, 23, a landscaper, waved a Confederate flag over his head. "We want to return to the days in Richmond when this flag flew proudly," he said.

"Sorrowful, Satisfied Crowds Greet Briley Execution in Va.", Washington Post, October 14, 1984, at A1, col. 3, A12, col. 3. At the execution of James Briley on April 18, 1985, the same crowd gathered, wearing Nazi armbands and shouting "White power" and "Sieg Heil."

We do not suggest that these people are representative or typical of all Virginians,[11] and the leadership of Virginia, from the Governor to the editorial writers of the Richmond Times-Dispatch (*see* Richmond Times-Dispatch, April 20, 1985) have condemned such displays. But the recognition that responsible, right-thinking Virginians deplore such actions and such attitudes virtually compels the acknowledgement that the state has no legitimate interest in having such people on its juries.

If bigots wore signs, *voire dire* on racial prejudice would be unnecessary. Arguably, if counsel or the court was familiar with the community from which the jury poll was to be drawn, such local knowledge might render *voir dire* on racial prejudice unnecessary. But bigots don't wear signs, and the out-of-town judge had no local knowledge. This returns us to our central question—did Willie Turner have a right to know if there were any of those people on his jury?

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[11] Rabidly racist demonstrations when executions occur are not unique to Virginia; similar demonstrations have been held in Florida and Texas.

3. Although A Decision To Convict A Defendant Is Usually An Objective Decision, The Decision To Impose Sentence Is Virtually Always A Subjective Decision.

In *California* v. *Ramos*, *supra*, 77 L.Ed.2d at 1185, this Court discussed the difference in the task of the guilt/innocence jury and the sentencing jury.

> More to the point, however, is the fundamental difference between the nature of the guilt/innocence determination at issue in *Beck* [v. *Alabama*, 447 U.S. 625 (1980)] and the nature of the life/death choice at the penalty phase. . . . In returning a conviction, the jury must satisfy itself that the necessary elements of the particular crime have been proved beyond a reasonable doubt. In fixing a penalty, however, there is no similar "central issue" from which the jury's attention may be diverted. Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, as did respondent's jury in determining the truth of the alleged special circumstance, the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment.

In this passage, Justice O'Connor cited in a footnote Justice Rehnquist's opinion in *Zant* v. *Stephens:*

> [S]entencing decisions rest on a far-reaching inquiry into countless facts and circumstances and not on the type of proof of particular elements that returning a conviction does.

77 L.Ed.2d at 266 (Rehnquist, J., concurring in the judgment).

4. The Effects Of Racial Prejudice Are Greatest When The Case Is A "Mid-Range" level of aggravation.

The various statistical studies performed on the imposition of the death sentence confirm what should seem obvious—that the effect of racial prejudice (or any other

kind of prejudice) will be most pronounced in the difficult cases—the cases in which there is some degree of aggravating evidence, but the facts are not awful; the cases in which there is some mitigating evidence, but not enough to be compelling.

Those statistics were presented at some length in the District Court hearing in *McCleskey* v. *Kemp*, 753 F.2d 877 (11th Cir. 1985) (en banc), decided January 29, 1985. In *McCleskey*, the death-sentenced inmates offered extensive statistical evidence to establish the disparate impact of the death sentence, in the hope that the federal courts would rule Georgia's death penalty statutes unconstitutional. The scientists studying the administration of the Georgia death penalty statute concluded that the mid-level cases were the ones in which the influence of racial prejudice was greatest.

> [T]he results showed a 6% racial effect systemwide for white victim, black defendant cases with an increase to 20% in the mid-range of cases.

McCleskey, supra, at 887.

F. In Virginia And Across The Country, The Death Penalty Is Still Being Applied Disproportionately Against Blacks Who Kill Whites.

The revision of death sentence statutes after *Furman* did not abolish racial prejudice, and while post-*Furman* practice has probably reduced race discrimination in the imposition of the death sentence, it has not ended it. The evidence is clear that the death penalty is still being applied in a manner that results in a disparate impact against black defendants, and particularly against those who kill whites. Bowers & Pierce, "Arbitrariness and Discrimination under Post-Furman Capital Statutes," 26 Crime and Delinquency 563 (1980); *See, e.g.*, Bowers,

"The Pervasiveness of Arbitrariness and Discrimination under Post-*Furman* Capital Statutes," 74 J. Crim. L. & Criminology 1067 (1983); Gross & Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing in Homicide Victimization* 15-32 (unpublished study) (October, 1983) (introduced as an exhibit to Motion to Alter or Amend Judgment).

At trial, Petitioner introduced a study by Bowers and Pierce (Defendant's Exhibit 1), showing the discriminatory manner in which the death sentence was being imposed in Georgia, Florida, Texas, Alabama and Ohio. In those five states, the probability of receiving the death sentence for homicide between the effective date of the various states' post-*Furman* statutes through December, 1977, was correlated with the race of the victim and of the offender. The study concluded that for all murders committed in the commission of another felony (as is usually the case in Virginia), one who kills a white is almost five times more likely to receive the death sentence than one who kills a black (17.15% as opposed to 3.87%).[12]

This data reveals a very strong likelihood that the race of the offender and the race of the victim (and, in particular, the combination of those two variables) will have a significant effect upon whether a particular defendant

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[12]

	Estimated Number of Offenders	Persons Sentenced to Death	Probability of a Death Sentence
Black kills White	443	100	22.57%
White kills White	857	123	14.35%
Total—White Victim	1,300	233	17.15%
Black kills Black	441	17	3.85%
White kills Black	50	2	4.00%
Total—Black Victim	491	19	3.87%
Total—All Victims	1,791	242	13.47%

receives the death sentence. This is true across the country, as the survey data from Georgia, Florida, Texas, Alabama and Ohio shows.

Bowers & Pierce did not study Virginia death sentences. However, Gross & Mauro did study the Virginia death sentences in nineteen cases, as compared to 1,389 homicides. The results, in rough statistical terms, show that one who kills a white is four times more likely to receive the death sentence than one who kills a black (2.3% to 0.5%). If a black kills a white, he has an 8.2% chance of receiving the death penalty; if a white kills a white, he has a 1.3% chance of receiving the death penalty; if a black kills a black, he has a 0.6% chance of receiving a death penalty; and no white has received the death penalty for killing a black since Virginia's new statute was enacted in 1977.[13]

Because the death penalty had been imposed in only 19 cases during the time period under study, Gross and Mauro could not call their Virginia data statistically significant. However, Gross and Mauro found that Virginia's data was consistent with the data from other states—an observation which is also consistent with the observation that Virginians (despite their occasional protestations to the contrary) are basically the same kind of people, with the same kinds of prejudices, as other Americans. The fact that the data for Virginia is not statistically significant because of the small sample size is therefore not relevant—our claim is dependent upon human nature, not a particular statute. The sample size for all of Gross and Mauro's studies, as for all of Bowers and Pierce's studies, is more than adequate to show the disparate impact.

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[13] James Briley's execution on April 18, 1985, marks the first time in Virginia that anyone had been executed for murder of a black.

This argument is not statute-specific or state-specific. Nothing about the Virignia death penalty statute, as opposed to the statutes of North Carolina, South Carolina or any other state, makes it less likely that racial prejudice will motivate a juror to return a verdict of death.[14] Nor can it seriously be suggested that the ethos of the citizenry of Virginia is significantly different of that of any other southern state.[15]

All of the data, taken together, show clearly that those who kill whites are far more likely to receive the death penalty than those who kill blacks.

Of course, since we are not asserting a *Furman*-like rationale, we need not show that Willie Turner's death sentence can only be explained by racial prejudice on the jury, or that statistical evidence is "so strong that the only permissible inference is one of statistical discrimination." *Adams* v. *Wainwright*, *supra*, 707 F.2d at 1449. We need only show that there was a "more substantial indication of the likelihood of racial prejudice affecting the jurors' deliberations" in this case. *Rosales-Lopez*, *supra*, at 190.

The statistics just mentioned are admittedly not conclusive in Virginia to justify the drastic step of declaring the Virginia system to be unconstitutional. However, the data clearly indicate a tendency that courts must take

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[14] Indeed, if anything, the basically subjective, discretionary nature of the vileness and dangerousness criteria make it more likely that Virginia juries will lack objective, reviewable criteria for imposing death.

[15] Or that of most other states across the country. Racism has long been a particular problem in the South, but is by no means unique to the South. The data offered at trial from Professors Bowers and Pierce shows that racially discriminatory application was suggested in Ohio as well as in four southern states.

active measures to counter. Courts must be vigilant to potential racial influences in a trial, and these influences must be eliminated wherever possible.

CONCLUSION

This Court's decision in *Gregg* v. *Georgia*, 428 U.S. 153 (1976), together with the other cases decided that day, may be interpreted as saying, in essence, that the death penalty is permissible *because*, and only because, the newly redrafted statutes effectively channel the discretion of the jury. This Court assumed in *Gregg* that the state trial and appellate courts would exercise stricter review of the jury-imposed death sentences; that review would be more searching than usual, and would be particularly attuned to suggestions of arbitrariness or prejudice.

The extra solicitude shown in capital cases was highlighted in *Gardner* v. *Florida*, 430 U.S. 349 (1977), and *Lockett* v. *Ohio*, 438 U.S. 586, 604 (1978):

> 'The penalty of death is qualitatively different' from any other sentence. [*Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976)]. We are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed.

While the extra degree of reliability sought does not translate into any difference in substantive standards, it implies that courts will take greater procedural precautions. Where there is a way to avoid prejudice, it should be taken. If the "extra degree of reliability" means anything, it means that the courts should bend over backwards to make sure that possible elements of prejudice or discrimination are eliminated.

In Willie Turner's case, it would have been very simple to deal with the threat to that "extra degree of reliability"—the trial judge should have asked the jury questions about any possible racial prejudices. Then, and only then, would we have received the answer to the question that we have posed throughout this case—were any of those people who believe that death is a particularly appropriate punishment for blacks who kill whites on Turner's jury?

This Court should reverse and order a new trial or sentencing hearing for Willie Turner.

Respectfully submitted,

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